MM 92-258

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 14, 1993 Decided November 23, 1993

No. 93-1169

ALLIANCE FOR COMMUNITY MEDIA;
THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY;
PEOPLE FOR THE AMERICAN WAY,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

NEW YORK CITIZENS COMMITTEE FOR RESPONSIBLE MEDIA;
MEDIA ACCESS NEW YORK;
BROOKLYN PRODUCERS' GROUP;
DAVID CHANNON;
NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
INTERVENORS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 93–1171

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM;
AMERICAN CIVIL LIBERTIES UNION,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

NEW YORK CITIZENS COMMITTEE FOR RESPONSIBLE MEDIA;
MEDIA ACCESS NEW YORK;
BROOKLYN PRODUCERS' GROUP;
DAVID CHANNON;
NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
INTERVENORS

MORALITY IN MEDIA,
AMICUS CURIAE

No. 93–1270

ALLIANCE FOR COMMUNITY MEDIA;
THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY;
PEOPLE FOR THE AMERICAN WAY,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

NEW YORK CITIZENS COMMITTEE FOR RESPONSIBLE MEDIA;
MEDIA ACCESS NEW YORK;
BROOKLYN PRODUCERS' GROUP;
DAVID CHANNON;
NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
INTERVENORS

No. 93–1276

AMERICAN CIVIL LIBERTIES UNION,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

NEW YORK CITIZENS COMMITTEE FOR RESPONSIBLE MEDIA;
MEDIA ACCESS NEW YORK;
BROOKLYN PRODUCERS' GROUP;
DAVID CHANNON;
NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
INTERVENORS

NATIONAL LAW CENTER FOR CHILDREN AND
FAMILIES; NATIONAL LEGAL FOUNDATION,
AMICI CURIAE

Petition for Review of an Order of the
Federal Communications Commission

I. Michael Greenberger argued the cause for petitioners in Nos. 93–1169, 93–1171, 93–1270 and 93–1276. With him on

the joint briefs were *Charles S. Sims, Marjorie Heins, Lisolette E. Mitz, Arthur Barry Spitzer, James Ned Horwood, Andrew Jay Schwartzman* and *Elliot M. Mincberg. Michael Kenneth Isenman* entered an appearance for petitioners The Alliance for Communications Democracy and People for the American Way in No. 93–1270.

Gregory M. Christopher, Counsel, Federal Communications Commission, argued the cause for respondents. With him on the brief were *Renee Licht,* Acting General Counsel, Federal Communications Commission, *Daniel McMullen Armstrong,* Associate General Counsel, Federal Communications Commission, *Stuart E. Schiffer,* Acting Assistant Attorney General, United States Department of Justice, *Barbara L. Herwig* and *Jacob M. Lewis,* Attorneys, United States Department of Justice.

On the brief for intervenor National Cable Television Association, Inc. were *Daniel Leslie Brenner, Michael Stuart Schooler* and *Diane B. Burstein.*

On the joint brief for *amicus curiae* National Law Center for Children and Families and National Family Legal Foundation were *H. Robert Showers, Jr.,* and *James P. Mueller.*

Robert Thomas Perry entered an appearance for intervenors New York Citizens Committee for Responsible Media, Media Access New York, Brooklyn Producers' Group and David Channon.

Paul J. McGeady entered an appearance for *amicus curiae* Morality in Media in No. 93–1171.

Before MIKVA, *Chief Judge,* WALD and EDWARDS, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* WALD.

WALD, *Circuit Judge:* Petitioners, a group of cable programmers and organizations of listeners and viewers, seek review of two orders issued by the Federal Communications

Commission ("FCC" or "Commission") regulating indecent programming on cable "access" channels. Access channels are those channels a cable operator must set aside for public, educational, or governmental use ("PEG access") or use by unaffiliated commercial programmers ("leased access").[1] We examine two constitutional questions: First, when the government compels private cable operators to relinquish editorial control over a certain number of "access" channels, making these available for general use by unaffiliated programmers, may it permit cable operators to deny access on those channels to programs that are "indecent," as defined by the FCC? Second, if the cable operator does not ban "indecent" programs from leased access channels, may the government compel the cable operators to place on a separate channel all leased access programs that the programmer, as required by law, has identified as "indecent," and to block such channel until the subscriber requests in writing that the block be lifted? As to the first question, we hold that not only does the First Amendment prohibit the government from banning all indecent speech from access channels, it also prevents the government from deputizing cable operators with the power to effect such a ban. As to the second question, in view of the constitutional problems of underinclusiveness presented by the total lack of regulation of indecent programming on commercial cable channels, we decline at this juncture to rule definitively on the constitutionality of the blocked access channel without permitting the Commission to cure the un-

[1] *In re Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 7 F.C.C.R. 7709 (1992) (notice of proposed rulemaking); 8 F.C.C.R. 998 (1993) (first report and order); 8 F.C.C.R. 2638 (1993) (second report and order). These orders were issued pursuant to section 10 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10, 106 Stat. 1460, 1486 (to be codified at 47 U.S.C. §§ 531, 532(h), 532(j) & 558).

derinclusiveness of the regulations or to justify adequately its regulatory approach apart from the operator ban.

I. Background

When Congress passed the Cable Communications Policy Act of 1984, Pub. L. No. 98–549, 98 Stat. 2779 ("1984 Act"), it sought, among other things, to "assure that cable communications provide . . . the widest possible diversity of information sources and services to the public." 47 U.S.C. § 521. To achieve this goal, the 1984 Act required cable operators to set aside "leased access" channels for commercial use by any entity not affiliated with the cable operator. *Id.* at § 532(b). It further authorized franchising authorities to require cable operators to provide "PEG access" channels for public, educational and governmental use. *Id.* at § 531. Because the 1984 Act barred cable operators from exercising any editorial control over either type of access channels, *id.* at §§ 531(e), 532(c)(2) (amended 1992), it granted cable operators immunity from liability for any access channel programming, *id.* at § 558 (amended 1992).

The House Report on the 1984 Act conceived of access channels as "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet." H.R. Rep. No. 934, 98th Cong., 2d Sess. 30 (1984). As such, Congress embraced access channels as a way to "provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas." *Id.* However, the statute did not grant leased or PEG access to material unprotected by the Constitution. 47 U.S.C. §§ 532(h), 544(d) (amended 1992). In addition, Congress required cable operators to provide subscribers with a "lockbox" that would allow an adult to "prohibit viewing of a particular cable service during periods selected by that subscriber." *Id.* at § 544(d)(2)(A).

In 1992 Congress enacted the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102–385, 106 Stat. 1460 (to be codified at 47 U.S.C. §§ 531, 532(h), 532(j) & 558) ("1992 Act" or "Act"). Section 10 of the Act ("section 10") worked two changes, now being challenged before this court. First, it permits a cable operator to prohibit indecent programming on all access channels. Pub. L. No. 102–385, § 10(a) & (c), 106 Stat. at 1486. Second, it compels those cable operators who do not bar indecent programming on leased channels to place such material on separate channels that the subscriber can only view by prior written request. *Id.* at § 10(b). In detail, the 1992 Act gives cable operators the authority to refuse leased access to what they reasonably perceive to be indecent programming. *Id.* at § 10(a). It also requires the FCC to promulgate regulations with respect to leased access channels "requiring cable operators [who do not exercise their authority to refuse access to 'indecent material'] to place on a single channel all indecent programs, as identified by program providers." *Id.* at § 10(b). This channel must be blocked unless the subscriber requests access to the channel in writing. *Id.* The Act requires the FCC to promulgate regulations with respect to PEG channels, allowing the cable operator to prohibit "any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." *Id.* at § 10(c). Finally, it removes cable operators' immunity from liability for access programming insofar as it "involves obscene material." *Id.* at § 10(d).

In late 1992 the Commission commenced informal rulemaking which resulted in the rules at issue in this case. *In re Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 7 F.C.C.R. 7709 (1992) (notice of proposed rulemaking); 8 F.C.C.R. 998 (1993) (first report and order) [hereinafter: "*First Report and Order*"]; 8 F.C.C.R. 2638 (1993) (second report and order). The implementing regulations largely track the statute. With respect to leased access they allow the cable operator to "prohibit[ ] any programming which it reasonably believes" is indecent;

require programmers to identify any part of their own programming they consider indecent (failure of which would allow the cable operator to deny access); and require the cable operator either to keep such programming from being transmitted or to place all such programming on blocked channels to which the subscriber can request access in writing. *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 7990, 7993 (1993) (to be codified at 47 C.F.R. § 76.701). With respect to PEG access, the regulations permit a cable operator to "prohibit . . . any programming which contains obscene material, indecent material . . ., or material soliciting or promoting unlawful conduct[, *i.e.*] . . . material that is otherwise proscribed by law," and authorize cable operators to require programmers to certify that their programs do not contain any material in these categories. *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 19,623, 19,626 (1993) (to be codified at 47 C.F.R. § 76.702).

The regulations have been stayed pending review, and the petitions for review have been expedited and consolidated. *Alliance for Community Media v. FCC*, Nos. 93–1270 & 93–1276 (D.C. Cir. May 7, 1993) (order filed); *Alliance for Community Media v. FCC*, Nos. 93–1169 & 93–1171 (D.C. Cir. April 7, 1993) (order filed). Petitioners challenge section 10 of the 1992 Act and the FCC's implementing rules principally on the basis that they violate the First Amendment and the equal protection component of the Fifth Amendment.[2]

[2] In addition, petitioners claim that the FCC changed its position from an earlier reliance on the efficacy of content-neutral lockboxes to the adoption of the more restrictive rules at issue here, and that this change in agency position violates the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551–706. Joint Brief for Petitioners at 24, 33. Petitioners' reliance on the APA, however, is misplaced, because Congress has intervened and mandated the more restrictive alternative adopted by the Commission. *See, e.g., INS v. Chadha*, 462 U.S. 919, 955 (1983) (Congress may "legislatively alter[ ] or revoke[ ]" its "delegation of authority" (footnote omit-

II. Analysis

Petitioners charge that both the authorizing provisions of section 10 and the FCC's implementing regulations (i) are not the least restrictive means to further the government's asserted interest, (ii) impermissibly regulate indecency only on access channels, (iii) will chill protected expression, and (iv) impose a prior restraint on speech without the constitutionally required procedural protections. We distill from this two constitutional questions.

First, when the government requires cable operators to set aside access channels for general use on a content-neutral basis, may it constitutionally permit cable operators to ban indecent material from these channels? The government responds that it may, maintaining that any resulting ban of indecent material from access channels would reflect the editorial judgment of private cable operators to whom First and Fifth Amendment strictures do not apply. For reasons set forth below, we reject the government's argument. Relying on our prior ruling in *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1281 (1992) ("*ACT II*"), we hold that the government may not constitutionally authorize a cable operator to ban indecent material from access channels.

Second, if cable operators do not exercise their authority to ban indecent material from *leased access* channels, may the government constitutionally require cable operators to segregate and block indecent material on those channels? Since we hold that the authorization of a complete ban on indecent material from access channels is unconstitutional, we must examine the constitutionality of a segregation and blocking requirement on leased access channels on its own. This in turn requires us to focus on the question of whether the

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ted)). Congress' decisions are exempt from the requirements of the APA. 5 U.S.C. § 551(1). To require an agency to justify its change in position taken at the express direction of Congress would be tantamount to subjecting the legislative decision itself to the APA.

statute and the FCC's implementing regulations impermissibly single out leased access channels for the imposition of a segregation and blocking requirement of indecent programming, while leaving commercial channels and (as a consequence of our decision) PEG channels wholly unregulated, *i.e.*, we must focus on the underinclusiveness of the leased channel blocking device. When the Congress and the Commission originally considered the blocked channel mechanism, they each did so in a context that presented some symmetry between PEG access, leased access, and commercial channels, due to cable operators' authority to exclude indecent material on all three types of channels. Because we hold today that authorizing cable operators to ban indecent material from both PEG and leased access channels is unconstitutional, the remaining part of the regulation singles out leased access programmers for restrictions far more conspicuously than did Congress when it enacted section 10. As a result, we think it prudential to remand the case to the FCC so that it may consider the legality and/or desirability of the blocked channel device applied to leased access channels only. As a prelude to our analysis, we reiterate that indecent speech, as distinct from obscene speech, is protected by the Constitution. *See Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (striking down ban on indecent telephone messages); *Action for Children's Television v. FCC*, 852 F.2d 1332, 1340 (D.C. Cir. 1988) ("*ACT I*").[3]

[3] In *Miller v. California*, 413 U.S. 15 (1973), the Supreme Court announced a three-part test for determining whether material is "obscene," and therefore unprotected by the First Amendment: "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable ... law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24 (internal quotes and citations omitted). Thus, for example, "[p]atently offensive representations or descriptions of ultimate sexual acts, ... masturbation, excretory functions, and lewd exhibi-

A. *Section 10's Authorization of Cable Operators to Ban Indecent Programming From Leased Access and PEG Access Channels*

We examine first whether the statute and regulations trigger First and Fifth Amendment scrutiny. The constitutional guarantees of free speech and equal protection of the laws protect against incursion of these liberties by the government but not by private persons. *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) (free speech); *Public Utils. Comm'n v. Pollak*, 343 U.S. 451, 461 (1952) (free speech and equal protection); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (equal protection). The government argues that the parts of the regulations authorizing cable operators to deny access to indecent material do not trigger First or Fifth Amendment analysis because a private cable operator—not the government—would be denying access to indecent material. *See, e.g.*, Respondents' Brief at 16. However, even where it is the decision of a private person which ultimately triggers the abridgment of speech, or effects the challenged discrimination, the state may nevertheless be held responsible if it

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tion of the genitals" could be considered obscene, unless they had "serious literary, artistic, political, or scientific value." *Id.* at 25–26. The Court in *Miller* thus essentially "isolate[d] 'hard core' pornography from expression protected by the First Amendment." *Id.* at 29.

The FCC, on the other hand, defines "indecent" material as material "that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." *Implementation of Section 10*, 58 Fed. Reg. at 7993 (to be codified at 47 C.F.R. § 76.701(g)). It would therefore include in its sweep material that does not appeal to the prurient interest or that taken as a whole may be of the highest literary, artistic, political, or scientific value. For example, a truly scientific program—not merely a pretext for showing material that appeals to the prurient interest—that discusses the prevention of life-threatening diseases through the use of condoms could perhaps be considered "indecent" but would hardly seem to lack the scientific or social value so as to lose protection under the First Amendment.

significantly encouraged the private actor to commit the infringement. *See, e.g., Franz v. United States*, 707 F.2d 582, 592 n.38 (D.C. Cir. 1983) (holding government's encouragement through witness protection program of mother's decision to keep children from father constituted state action). We hold that section 10 significantly encourages the cable operator to ban indecent material, and that the cable operator's ban thus constitutes "state action."[4] As such, it is subject to the same constitutional limitations as those directly constraining the government. In reaching this conclusion, we rely on the Supreme Court's state action doctrine and take specific guidance from *Reitman v. Mulkey*, 387 U.S. 369 (1967), a state action case involving government encouragement of private decisions to discriminate based on race.

1. *State Action in Cable Operators' Decision to Ban Indecent Material from Leased Access and PEG Access Channels*

The Supreme Court has not yet devised an infallible test for determining when actions of private parties are so intertwined with governmental action as to be attributable to the government for purposes of a constitutional inquiry. The determination of whether state action exists in such cases is generally the result of a complicated and fact-specific inquiry. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961). Nevertheless, the Supreme Court has found state action to inhere in a variety of situations in which the constitutional violation is ultimately the result of a private decision. *See generally* 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, § 16 (2D ED. 1992).

We start with the proposition that a state's general regulation of a private industry is insufficient in itself to establish

[4] We follow the general usage of the phrase "state action" as encompassing federal, state, or local government action. *See* 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 16.1, at p. 524 (2D ED. 1992).

state action. Even if the state confers a license or monopoly power upon a private entity, no state action will be found unless the state is specifically involved in the action being challenged. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). The Supreme Court has explained that "the inquiry must be whether there is a sufficiently close nexus between the State and the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 351 (citation omitted). *See Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). The government may, however, be held responsible for the decision of a private party if it has "provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." *Blum*, 457 U.S. at 1004. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982) (quoting *Blum*, 457 U.S. at 1004); *Jackson*, 457 U.S. at 357 (noting government did not place "imprimatur" on private action); *id.* at 357–58 & n.17 (noting absence of overt or covert encouragement by government); *accord Franz v. United States*, 707 F.2d 582, 592 n.38 (D.C. Cir. 1983).[5] The issue, then, for us is whether by statute or regulation the government has significantly encouraged private cable operators to ban indecent material from access channels.

Under the statute and regulations governing cable television, the cable operator is relieved of all editorial control over access channels, 47 U.S.C. §§ 531(e), 532(c)(2) (amended 1992), except in the case of constitutionally protected "indecent" material, as defined by the government. By granting the cable operators this exceptional authority to ban indecent material totally from access channels, the government expressly furthers an announced policy to limit children's access to such material. 1992 Act, § 10, 106 Stat. at 1486 (entitled "Children's Protection From Indecent Programming on

[5] In *Franz*, we noted that the single most reliable indicator of state action is "significant governmental promotion of the specific conduct." *Franz*, 707 F.2d at 592 n.38.

Leased Access Channels").[6] In promotion of that policy, the government requires leased access programmers to identify any of their programming that contains indecent material, *Implementation of Section 10,* 58 Fed. Reg. at 7993 (to be codified at § 76.701(d)-(f)), and permits cable operators to require PEG access programmers to identify any of their programs containing indecent material. *Implementation of Section 10,* 58 Fed. Reg. at 19626 (to be codified at § 76.702). Moreover, the government defines what constitutes "indecent" material, 1992 Act, § 10(a) & (b), 106 Stat. at 1486,[7] and will step in to resolve certain disputes surrounding the administration of that standard, *First Report and Order,* 8 F.C.C.R. at 1010 ¶¶ 73–75.

The government argues nonetheless that, under the regulations, the cable operator is ultimately free to decide whether or not to deny access to indecent programming. The government maintains that with respect to access channels the 1992 Act simply restores to cable operators a measure of the editorial control they enjoyed prior to the 1984 Act. We do not find that argument convincing. The Supreme Court has consistently held the government responsible for discrimina-

[6] Although the title of section 10 of the 1992 Act refers only to leased access channels, section 10 also includes the provisions concerning indecent programming on PEG access channels. 1992 Act, § 10(c), 106 Stat. at 1486.

[7] Section 10(a) authorizes the cable operator to prohibit leased access programming that "the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." 1992 Act, § 10(a)(2), 106 Stat. at 1486. Section 10(b)'s blocking requirement defers to the FCC's definition of "indecent" material, *id.* at § 10(b), as material "that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." *Implementation of Section 10,* 58 Fed. Reg. at 7993 (to be codified at 47 C.F.R. § 76.701(g)). The Commission also applies the same definition of "indecent" material when regulating PEG access channels. *Implementation of Section 10,* 58 Fed. Reg. at 19,626 (to be codified at 47 C.F.R. § 76.702).

tion that it significantly encourages and has refused to allow it to encourage discrimination on the part of private actors on grounds that it could not itself invoke. *Reitman v. Mulkey*, 387 U.S. 369 (1967).

In *Reitman*, a private property owner refused to rent an apartment to a couple based on race. He justified his action by citing to a state constitutional amendment establishing the right to discriminate in housing, which implicitly repealed earlier fair housing statutes. The United States Supreme Court affirmed the state supreme court's decision striking down the state amendment as violative of the Fourteenth Amendment, on the ground that "a prohibited state involvement could be found even where the state can be charged with only encouraging, rather than commanding discrimination." 387 U.S. at 375 (internal quotes omitted). It approved the state court's decision which "quite properly" examined the amendment in "terms of its 'immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment.'" *Id.* at 373 (quoting state supreme court). In *Reitman*, the Supreme Court rejected the argument that the amendment merely restored the power to discriminate that private property owners had enjoyed prior to the fair housing amendments. Instead, the Supreme Court upheld the state court's finding of state action and invalidation of the amendment based on an assessment that the amendment "was intended to authorize, and does authorize, racial discrimination in the housing market[; that t]he right to discriminate is now one of the basic policies of the State . . . [and that] the section will significantly encourage and involve the State in private discriminations." *Id.* at 381. Taking guidance from *Reitman*, we examine the regulatory scheme before us in terms of (a) its immediate objective, (b) the context in which the specific authorization to ban indecent material was issued, and (c) the regulations' ultimate effect.[8]

[8] Unlike the case before us, *Reitman* involved an amendment to the state constitution that also banned future enactment of fair housing laws without an additional amendment of the state constitution. *See Hunter v. Erickson*, 393 U.S. 385, 389 (1969). The 1992

a. *The Immediate Objective of the Regulations*

There can be no doubt that the immediate objective of the 1992 Act is to suppress indecent material and limit its trans-

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Act, of course, could be changed by simple legislation. That difference, however, is not critical in our reasoning. While *Reitman* notes that the right to discriminate "was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government," 387 U.S. at 377, it clearly did not rely on this fact for its basic reasoning, nor was its reasoning limited to the constitutional amendment context, as evidenced by its discussion of *McCabe v. Atchison, T. & S. F. Ry.*, 235 U.S. 151 (1914). In *McCabe* the Supreme Court dealt with a statute that required segregation of races in railway cars and, as construed by the Court, also permitted carriers to provide cars for whites only but not for blacks. 235 U.S. at 161. The *Reitman* Court said that the *McCabe* "Court made it clear that such a statute was invalid under the Fourteenth Amendment because a carrier refusing equal service to Negroes would be 'acting in the matter under the authority of a state law.'" *Reitman*, 387 U.S. at 379 (quoting *McCabe*, 235 U.S. at 161–62). *Reitman* continued, "[t]his was nothing less than considering a permissive state statute as an authorization to discriminate and as sufficient state action to violate the Fourteenth Amendment in the context of that case." *Id.* Whether derived from a statute or a constitutional amendment, significant encouragement by the state of specific private acts suffices for a finding of state action. Such a finding depends upon the context surrounding the state's encouragement, not upon its technical status as constitutional amendment, statute, or administrative regulation.

We also decline to limit *Reitman* to the context of racial discrimination in violation of the Fourteenth Amendment. State action principles developed in the area of racial discrimination are not *sui generis*. Courts have frequently drawn on race discrimination cases for state action principles and applied them in other areas of the law. *See, e.g., Jackson*, 419 U.S. 345 (deprivation of property without due process of law), *Blum*, 457 U.S. 991 (denial of hearing prior to skilled nursing facilities' discharge or transfer of Medicaid patients), *Franz*, 707 F.2d at 590–94 (government's involvement in denial of husband's access to his children due to wife's membership in witness protection program).

mission on access channels, a purpose the government admits raises First Amendment concerns should state action be present.[9] The government argues before this court and section 10 itself states that the purpose of the regulation is to limit children's access to indecent material. 1992 Act, § 10, 106 Stat. at 1486.

b. *The Context of the Regulations*

The context of the regulations evinces an effort on the part of the government to enlist the cable operator in the suppression of indecent material. The government focuses the cable operator's attention on the only material the government seeks to suppress, and then permits the cable operator expressly to suppress that—and no other—material.

First, the regulations facilitate the identification of material the government wishes to suppress. In the case of leased access the regulations require cable programmers to identify indecent material contained in their programs, *Implementation of Section 10,* 58 Fed. Reg. at 7993 (to be codified at 47 C.F.R. § 76.701(d)-(f)), and in the case of PEG access the regulations expressly permit the cable operator to require such identification, *Implementation of Section 10,* 58 Fed. Reg. at 19,626 (to be codified at 47 C.F.R. § 76.702). These requirements of identification apply only with respect to the government-defined material. 58 Fed. Reg. at 7993, 19,626.

Next, the government has stripped the cable operator of any editorial control over cable access channels except for programming the government wishes to suppress. This aspect of the regulations persuades us to reject the government's reliance on three cases in which courts found no state action present in telephone companies' suppression of indecent messages furnished by message providers. *See Information Providers' Coalition for Defense of the First Amend-*

[9] Indeed, the government's counsel conceded at oral argument that if the court finds state action, the government loses on the validity of that part of the regulations permitting the prohibition of all access to indecent programs.

ment v. FCC, 928 F.2d 866 (9th Cir. 1991) (finding no state action in carrier's compliance with governmental requirement to block indecent messages until adult customer requests block to be lifted); *Dial Info. Servs. Corp. of N.Y. v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 966 (1992) (same); *Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291 (9th Cir. 1987), *cert. denied*, 485 U.S. 1029 (1988) (finding no state action in carrier's refusal to place any indecent messages on its message network where governmental prohibition was only directed at obscene material). At issue in each of these cases, were only those messages for which telephone companies would collect the fees from customers on behalf of the message providers. Messages for which the carrier did not provide these "billing services" could, in each of the three cases, be transmitted freely. Moreover, the carrier was under no governmental obligation to provide billing services to any message provider. These cases held that governmental regulation of messages for which carriers voluntarily provided billing services was insufficient to convert the private action at issue into state action. *See Information Providers*, 922 F.2d at 877; *Carlin*, 827 F.2d at 1293, 1295, 1297 [10]; *Dial Info.*, 938 F.2d at 1543. We read the absence of state action in the telephone context to derive from the absence of any governmental coercion to provide billing services for message providers. In the case before us, on the other hand, the government *is* compelling the cable operator generally to accept all programming for leased and PEG access channels on a content-neutral basis, but allows the cable operator to refuse that access when the message is

[10] The significance of the fact that the carrier in *Carlin* was voluntarily providing billing services to message providers is somewhat buried in the case, but nevertheless obvious. While the *Carlin* court assumes that the telephone company must offer its service to all alike without discrimination, 827 F.2d at 1293, it rejects the idea that the carrier must provide access to its "976 network" on a content-neutral basis, *id.* at 1295, *i.e.*, access to the 976 network, which is the carrier's billing services network, *id.* at 1293, is entirely voluntary, *e.g.*, *id.* at 1297.

indecent. If access to a cable channel serves as the parallel to billing services in the telephone cases, there is, in our case, indeed a compulsion to provide the service generally, *i.e.*, on a content-neutral basis for nonindecent material. The government's involvement in the case before us is consequently far greater than in the telephone cases because the government permits no editorial control over cable access channels except when indecent material is involved. In this case, the cable operator must rely on section 10 of the Act and the contested regulations for authority to ban indecent programming, because the government does not permit the cable operator to refuse to carry a programmer's constitutionally protected speech for any other reason.[11] *Cf. Reitman*, 387 U.S. 369.

To sum up, the government first strips a cable operator of editorial power over access channels, then singles out the material it wishes to eliminate, and finally permits the cable operator to pull the trigger on that material only.[12]

c. *The Ultimate Effect of the Regulations*

The ultimate effect of this banning authorization is hardly in doubt; the legislative history indicates that many cable operators will eagerly ban indecent programming. *See* S. REP. No. 92, 102d Cong., 1st Sess. 31 (1991).[13] Under the

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[11] Of course the regulations also permit the cable operator to ban "material that is otherwise proscribed by law." *Implementation of Section 10*, 58 Fed. Reg. at 19,626. For state action purposes the same analysis applies to the cable operator's editorial power over this type of material.

[12] The context of the case before us presents an even stronger case for state action than that in *Reitman* where the amendment left the property owner free to discriminate on any grounds he chose.

[13] The fact that cable operators willingly follow the government's encouragement does not immunize the government from taking responsibility for those actions. *See Peterson v. City of Greenville*, 373 U.S. 244 (1963) (regardless of actual motivation of private party, government must take responsibility for result it commands); *accord Carlin*, 827 F.2d at 1295. To the contrary, *Reitman* illustrates that the government's reliance on the willing compliance of private

statute and regulations, the cable operators have no incentive whatsoever to allow indecent access programmers onto leased access or PEG access channels. Of course the very reason for mandating access in 1984 and for continuing to mandate access of nonindecent material in 1992 was that unaffiliated programmers are *unable* to gain access to regular, commercial cable channels. A cable programmer seeks access to either leased or PEG access channels precisely because a mutually agreeable arrangement to transmit the program on regular commercial channels cannot be reached. *See id.* Indeed, the Act even regulates the rates that a cable operator may charge a programmer for transmission on leased access channels precisely because cable operators have traditionally priced leased access out of the range of many programmers. *See* 1992 Act, § 9, 106 Stat. at 1484; S. REP. No. 92, 102d Cong., 1st Sess. 31. For all these reasons, the government can confidently rely on cable operators to grasp the opportunity to ban certain kinds of leased and PEG access programming if they are permitted to do so. In that respect, the regulations appear as "a form of sophisticated discrimination whereby the [government] ... harness[es] the energies of private groups to do indirectly what [it] cannot [constitutionally] ... do [itself]." *Reitman*, 387 U.S. at 383 (Douglas, J., concurring) (footnotes omitted).

We conclude therefore from the immediate regulatory objective, its context, and its ultimate effect, that the total denial of access for indecent material authorized under the statute and implementing regulations constitutes state action and is therefore subject to the same constitutional restrictions that constrain the government if it were to enforce such a ban directly.[14]

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citizens is a factor increasing—not diminishing—the government's involvement. *See, e.g., Reitman*, 387 U.S. at 381–87 (Douglas, J., concurring).

[14] In the case of leased access, *Robinson v. Florida*, 378 U.S. 153 (1964), further supports our conclusion that state action attaches to the actions of a cable operator who must either ban indecent material or segregate and block such material. *Robinson* signals

2. *Indecent Speech and the First Amendment*

Indecent, nonobscene language is protected by the First Amendment, but is not immune from regulation. *Sable Communications of Cal., Inc. v. FCC,* 492 U.S. 115, 126 (1989) (striking down total ban on 'indecent' commercial telephone messages); *ACT I,* 852 F.2d 1332, 1340 (D.C. Cir. 1988). Reasonable time, place or manner restrictions on speech may be imposed, but where a statute regulates speech "in terms of subject matter[, t]he regulation '. . . slip[s] from the neutrality of time, place, and circumstance into a concern about content.' " *Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 99 (1972) (quoting Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 29). *See Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal.,* 475 U.S. 1, 20 (1986); *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 530, 536 (1980); *ACT I,* 852 F.2d at 1343 n.18. Because section 10 expressly regulates access programming on the basis of whether it contains indecent material, it must be treated as a content-based restriction and cannot be considered a constitutionally permissible time, place, or manner regulation. Although content-based regulations "presumptively violate the First Amendment," *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 46–47 (1986), the government "may . . . [, nevertheless] regulate the content of constitutionally protected speech in order to promote a

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that if a state imposes considerable enough burdens on one of a private actor's alternative choices, the private party's choice of the less burdensome alternative will be fairly attributable to the state. In that case, a restaurant owner who refused to serve blacks had called the police to remove a racially mixed group. A state regulation required racially segregated lavatory facilities "where colored persons are employed or accommodated." 378 U.S. at 156 (internal quotes and citation omitted). This burden on restaurants serving customers of both races was sufficient to implicate the state in a private restaurant's refusal to serve blacks altogether. The Court held that the burden imposed by the regulation on serving customers of both races evidenced that the trespass convictions were more than the result of a purely private decision to discriminate, and so reflected "state policy." *Id.* at 156–57.

compelling interest if it chooses the least restrictive means to further the articulated interest," *Sable*, 492 U.S. at 126. *See Consolidated Edison*, 447 U.S. at 540; *ACT I*, 852 F.2d at 1343 n.18.

3. *Least Restrictive Means*

The government's interest in "limiting the access of children to indecent programming," 1992 Act, § 10(b), 106 Stat. at 1486, has been recognized as a compelling interest. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (upholding FCC's ruling that broadcasting of indecent program in mid-afternoon was in violation of indecency prohibition); *Dial Info.*, 938 F.2d at 1541. While we acknowledge for purposes of this analysis the importance of this interest, we are unpersuaded that the authorization of a ban on indecent material presents the least restrictive means of furthering the asserted interest.[15] The government quite candidly admitted at argument that if a cable operator's ban of indecent programming from access channels constitutes state action, that ban is unconstitutional. The total denial of access based solely on the fact that the content of the protected speech is "indecent" raises the specter of "reduc[ing] the adult population ... [to receiving] only what is fit for children" by permitting and encouraging the cable operator to do just that. *Butler v. Michigan*, 352 U.S. 380, 383 (1957). *See Sable*, 492 U.S. at 127–31; *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60

[15] *Amici Curiae*, Morality in Media, the National Family Legal Foundation and the National Law Center for Children and Families, urge that we analyze this ban as merely a refusal of the government to subsidize indecent speech and as such not a subject of strict scrutiny. Brief of *Amici Curiae* at 12–20. Such analysis would, however, require us to go much beyond existing law in determining whether access channels qualify as subsidies and if they do whether their *sui generis* nature as a communication media requires different standards from other subsidies. Neither party has raised this issue in those terms and, moreover, the government has conceded that the bans are unconstitutional if they involve state action. Therefore, we do not believe we are required to undertake such an alternative analysis, involving as it would many complex and as yet undecided constitutional questions in its own right.

(1983) (striking down prohibition on mailing of unsolicited advertisements for contraceptives).

This court held, in *ACT II*, 932 F.2d 1504 (D.C. Cir. 1991), that in attempting to regulate indecency in broadcasting, Congress could not constitutionally enact a complete ban. *Id.* at 1509. We found in that case that the Constitution required some safe harbor period during which "indecent" material may be broadcast. *Id.* We have been presented with no evidence why the context of cable television should command a different conclusion. The government has not advanced any reason why its interest in limiting children's access to indecent material is substantially impugned by providing some safe harbor during which indecent material may be transmitted on the cable network. Nor has it convincingly shown that a variety of less drastic restrictions on indecent programming short of a total ban are ineffective.

The fact that a total ban on indecent programming is not the least restrictive alternative in the case of cable is recognized in the terms of the Act itself. Section 10 of the Act provides the cable operator with the choice of a patently less restrictive means to further the government's interest. The cable operator may transmit indecent material if it places such programming on a separate channel which can only be viewed at the subscriber's express request. 1992 Act, § 10(b), 106 Stat. at 1486. Since Congress has itself judged a channel-block to be an adequate means of furthering its compelling interest, it may not be heard to argue that authorization of a complete ban by cable operators is the only effective means of furthering that interest. Our conclusion as to the unconstitutionality of section 10's authorized denial of any access for indecent programming thus needs no further examination of other, less restrictive means, such as lockboxes, or segregation of indecent material with optional blocking at the subscriber's request. The ban falls under any application of the least restrictive means test.[16]

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[16] In addition to challenging the authorization of cable operators to ban indecent material, petitioners also challenge the regulations' authorization of cable operators to ban from PEG channels material

that is "proscribed by law." *Implementation of Section 10*, 58 Fed. Reg. at 19,626 (to be codified at 47 C.F.R. § 76.702). Petitioners charge that the operator ban on material proscribed by law is an unconstitutional prior restraint and that the FCC improperly interpreted the underlying statutory language of section 10 which permits cable operators to deny PEG access to "material soliciting or promoting unlawful conduct." 1992 Act, § 10(c), 106 Stat. at 1486. For the reasons expressed in the text of this opinion, we believe that the authorization of cable operators to ban such material proscribed by law constitutes state action. The FCC appeared to concede at oral argument that should state action inhere in any ban involved in this case, such ban would contravene the First Amendment.

An examination of the PEG regulation itself also suggests constitutional infirmity. Even if we limited the regulatory language, which permits a ban on material "proscribed by law," to encompass only material that is constitutionally proscribable under *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" (footnote omitted)), and *Hess v. Indiana*, 414 U.S. 105 (1973) (same), the ban could still be challenged as an unlawful prior restraint, because it lacks the proper safeguards required by the Constitution. "[A] system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: *First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 561 (1975).

The absence of such safeguards is similarly evident in the Commission's authorization of cable operators to ban obscene material. *See* 1992 Act, § 10, 106 Stat. at 1486; *Implementation of Section 10*, 58 Fed. Reg. at 7993 (to be codified at 47 C.F.R. 76.701(a)); 58 Fed. Reg. at 19,626 (to be codified at 47 C.F.R. § 76.702).

B. *Segregation and Blocking Requirement for Indecent Material on Leased Access Channels*

Having found the authorization to ban indecent material from access channels unconstitutional, we turn now to whether the remainder of the indecency regulation passes constitutional muster. Since we believe that the segregation and blocking requirement as applied only to leased access channels is inadequately justified, we express no opinion as to the general viability of a segregation and blocking approach in regulating indecent material in the cable medium.

Petitioners charge, *inter alia*, that the segregation and blocking requirement impermissibly singles out leased access programmers for regulation, leaving indecent material on commercial channels and (as a result of our ruling) PEG channels unregulated. The government responds that any differential treatment present in the regulatory scheme satisfies the minimal standard of rational scrutiny to be applied in this case. *See* Respondents' Brief at 30. As we discuss below, the government misapprehends the applicable legal standard.

1. *Underinclusiveness and the First Amendment*

The Supreme Court has long recognized that the principles of equal protection and of the First Amendment are intertwined. *See Niemotko v. Maryland*, 340 U.S. 268 (1951); *Mosley*, 408 U.S. at 94–95; *Carey v. Brown*, 447 U.S. 455 (1980); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227–28 n.3 (1987); *see also* 4 ROTUNDA & NOWAK, *supra*, § 20.11, at p. 48; Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975); Geoffrey Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 201–07 (1983) (noting dangers of emphasizing equal protection in the area of free speech). Under both equal protection and First Amendment analyses, when a regulation aimed at alleviating a

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Since we are remanding other parts of the regulations to the FCC for other reasons, it will have ample opportunity to reexamine these remaining PEG ban issues.